

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALLEN L. THROM</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,088 & 198,794
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent appealed Administrative Law Judge Brad E. Avery's June 15, 1999, Award Upon Remand. The Appeals Board heard oral argument on January 26, 2000. Stacy Parkinson served as Appeals Board Member Pro Tem in place of Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Seth G. Valerius of Topeka, Kansas, appeared for the claimant. Jennifer L. Hoelker of Dakota City, Nebraska, appeared for the respondent. Michael G. Patton of Emporia, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record listed in the Award Upon Remand. The Appeals Board adopted the stipulations listed in the initial November 7, 1997, Award.

ISSUES

Administrative Law Judge Floyd V. Palmer entered the initial Award in this case on November 7, 1997. In Docket No. 193,088 with an October 24, 1987, accident date, he found claimant suffered a work-related right shoulder injury resulting in a six percent whole body permanent impairment of function rating. In Docket No. 198,794 with a May 20, 1992, accident date, he found claimant suffered a work-related bilateral shoulder injury resulting in a 24 percent whole body permanent impairment of function rating.

After both work-related injuries, claimant returned to work earning a comparable wage and therefore work disability was not an issue.<sup>1</sup> But the Administrative Law Judge limited claimant's award in both docketed cases to only medical expenses. He found claimant's injuries did not disable him for at least one week from earning full wages at the work at which he was employed.<sup>2</sup> Claimant appealed and requested the Appeals Board to remand the case to the Administrative Law Judge. The claimant argued, after he submitted his case to the Administrative Law Judge for decision, the law changed regarding the period of time an injured worker had to be disabled from earning full wages before the worker could receive permanent partial disability benefits. The claimant did not have an opportunity to present evidence to address that issue.

In an Order dated April 30, 1998, the Appeals Board found that fairness dictated that the case should be remanded to the Administrative Law Judge to provide the parties a reasonable opportunity to submit evidence and argument regarding the issues raised by K.S.A. 44-501(c) and for the Administrative Law Judge to issue a new Award.

The Award Upon Remand, that is the subject of this appeal, was entered by Administrative Law Judge Brad E. Avery on June 15, 1999. The Administrative Law Judge found the provisions of K.S.A. 44-501(c) did not apply to either docket because, after his injuries, claimant was placed on light duty for at least one week. Accordingly, the Administrative Law Judge, in addition to the medical benefits awarded in the November 7, 1997, Award, granted claimant a six percent permanent partial general disability in Docket No. 193,088 and a 24 percent permanent partial general disability in

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<sup>1</sup>See K.S.A. 1987 Supp. 44-510e and K.S.A. 1991 Supp. 44-510e.

<sup>2</sup>See K.S.A. 1987 Supp. 44-501(c) and K.S.A. 1991 Supp. 44-501(c).

Docket No. 198,794. Those permanent partial disability percentages were based on the findings contained in the November 7, 1997, Award.

On appeal, the respondent contends claimant failed to prove he was disabled from earning full wages for at least one week at the work which he was employed. Accordingly, the respondent requests the Appeals Board to reverse the Administrative Law Judge's Award and limit claimant's award to medical benefits as found in the November 7, 1997, Award.

Claimant, on the other hand, contends the Award Upon Remand should be affirmed. The claimant argues the award is supported by uncontradicted evidence in both dockets that, after claimant was injured, he was placed in an accommodated job that was not his regular work. Therefore, claimant argues K.S.A. 44-501(c) does not apply because after the injuries he was not performing the same work as he was performing before the injuries.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

On the date of both of claimant's accidents, October 24, 1987, and May 20, 1992, K.S.A. 44-501(c) provided as follows:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

But the Kansas Supreme Court had interpreted K.S.A. 44-501(c) to allow a worker who suffered an actual injury resulting in permanent partial disability to maintain a claim for the disability even if the worker returned to work within a week.<sup>3</sup> The clear purpose

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<sup>3</sup>See Gillig v. Cities Service Gas Co., 222 Kan. 369, 371, 564 P.2d 548 (1977).

of K.S.A. 44-501(c) was to protect employers from trivial and inconsequential claims, not to bar workers who suffered injuries which resulted in permanent partial disability.<sup>4</sup>

In 1995, the Court of Appeals, however, interpreted K.S.A. 44-501(c) as unambiguous and held the statute should be given its ordinary meaning and reversed an award where the claimant did not miss any work because of his injury.<sup>5</sup> The Kansas legislature immediately deleted the language from the statute and made the amendment retroactive.<sup>6</sup> But the Kansas Supreme Court, in a subsequent decision, found the statute could not be applied retroactively from the April 4, 1996, amendment date.<sup>7</sup> Therefore, in this case, the provisions of K.S.A. 44-501(c) apply.

The Appeals Board finds the claimant established through his testimony that he returned to work the day after his October 24, 1987, accident. Thus, claimant did not miss any work and was paid his regular wage. Before claimant's October 24, 1987, accident, he was working as a lead man in the box shop. This job required claimant to do heavy lifting and overhead lifting. Because of claimant's injury, his supervisor changed his regular job duties to duties that did not require him to do any heavy or overhead lifting. Claimant testified that he worked on this light-duty job for one and one half weeks.

Before claimant's May 20, 1992, accident, claimant testified he was working in the receiving department, unloading trucks and ordering. After the May 20, 1992, accident, claimant also returned to work the next day and did not miss any work. But claimant testified, because of his injuries, respondent placed him in a sedentary job in the billing department for approximately three months.

The Appeals Board concludes from claimant's uncontradicted testimony, that after both his October 24, 1987, work accident and his May 20, 1992, work accident, claimant was disabled from his regular work, that of a lead man and receiving department

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<sup>4</sup>See Alexandar v. Chrysler Motor Parts Corp., 167 Kan. 711, Syl. ¶4, 207 P.2d 1179 (1949).

<sup>5</sup>Boucher v. Peerless Products, Inc. 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

<sup>6</sup>See K.S.A. 1996 Supp. 44-501(c) and K.S.A. 1996 Supp. 44-501a.

<sup>7</sup>Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 297 (1997).

employee. Although claimant was receiving full wages for the accommodated work, the Appeals Board finds K.S.A. 44-501(c) does not apply because claimant, for at least one week, was not performing the job he was employed to do.<sup>8</sup>

The respondent did not contest the Administrative Law Judge's Award Upon Remand in either docket number in regard to the percentage of permanent partial general disability awarded. The Appeals Board, therefore, affirms the Administrative Law Judge's Award Upon Remand in all respects.

Additionally, the Appeals Board adopts as its own the Administrative Law Judge's findings and conclusions contained in both the initial November 7, 1997, Award and the June 15, 1999, Award Upon Remand that are not inconsistent with this Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's June 15, 1999, Award Upon Remand should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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BOARD MEMBER

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<sup>8</sup>Curran v. Lawrence Paper Company, Docket Nos. 82,282 and 82,317 (Kan. App. 2000).

c: Seth G. Valerius, Topeka, KS  
Jennifer L. Hoelker, Dakota City, NE  
Michael G. Patton, Emporia, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director